1976

Kriste A. Pitkin v. Preston's Incorporated and the Industrial Commission of Utah : Appellant's Reply Brief

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

KRISTE A. PITKIN,	*	
Plaintiff and Appellant,	*	Case no. 14588
vs.	*	
PRESTON'S INCORPORATED and THE INDUSTRIAL COMMISSION OF UTAH,	*	
Defendants and Respondents,	*	

APPELLANT'S REPLY BRIEF

The issues in the case at bar are necessarily those of law and fact. The question being whether the injury suffered by Appellant falls within the perimeters of the Workman's Compensation Statute, Utah Code Annotated 35-1-44, as being an accidental injury suffered in the course of employment.

Respondent correctly states the Supreme Court's duty to determine the correctness of the Industrial Commissions's application of the law to the instant fact pattern. However, Respondent argues factual issues in his brief and diminishes the true purpose of this inquest - to review the law as applied to the facts.

First, Respondent treats the issue of whether the Industrial Commission acted arbitrarily or capriciously by citing

pages of transcript in an attempt to demonstrate the alleged lack of credibility of Appellant. He thus fails to focus on the real issues:

1. Whether the Commission ever considered othe competent, substantial, and uncontroverted testimony, and

2. Whether the Commission correctly weighed the contradictory testimony of Patrick Preston against the cor ated testimony of Appellant. It follows from a careful readi of the record that there is no justification for finding that the Commission correctly weighed the evidence.

Contrary to Defendant's argument, Appellant informe at least two employees (Heather Hardy and Darl Halverson) and the owner of Preston's Inc. (Patrick Preston) of her injury. Heather Hardy's testimony places the accidental injury during the last week of August (T.R. 93,70). Yet, her testimony was never mentioned in Defendant's findings of fact. Heather also verified the fact that Darl Halverson had been informed of the injury. This testimony was never mentioned either.

More conspicuous is the absence of any mention of Patrick Preston's contradictory and evasive testimony. For example, on examination, he contradicted himself in regard to Appellant's duties (T.R. 85-86). However, his statements reg the frequency of his employee's complaining about backaches is lucid.

MR. PRESTON: Now have you ever had a complaint from her concerning any backaches, or any such similar problem?

A. Nearly since the day we took over I have received complaints about backaches, which I do not think unusual.

MR. PRESTON: Why?

A. I have never worked anyplace, been involved with people, when at some time they haven't complained about backaches. Lower back pain (T.R. 82 l. 14-25, see also T.R. 83 l 1-19)

This testimony points to the absurdity of predicating a theory of "prior back problems" or ordinary backaches.

On redirect, Respondent was unsure if Appellant had ever complained of backaches prior to her injury stating that he, himself, had suffered backaches several times and didn't want to say (T.R. 94 l. 20-25). The Commission failed to weigh the difference between mundane employee complaints of backaches due to weariness and the serious complaint by Appellant of lower back and sciatic pain. In fact, there is no substantial, competent evidence to show that an industrial accident did not occur.

Secondly, the notice of claim was given to the Industrial Commission within the year as required by statute. That a conversation between employer and employee does not fall within the statute is totally irrelevant, especially since no forms nor Workman Compensation information as well as insurance were even furnished by Respondent. Appellent's amended notice was uncontrovertibly and properly filed on January 31, 1974 as acknowledged on page two of Respondent's brief and precluded such an unfounded argument.

Finally, to satisfy the Workman's Compensation statu an injury must be accidental and happen in the course of emplo The accidental nature of Appellant's injury is established und authority of Fenton v. Thorley and its progeny. The burden of proving an accident in the course of employment is met unde authority of Baker. Respondent seeks to distinguish Baker by alleging that the evidence is not substantial, competent, or corraborated. Appellant submits that, as outlined above, the testimony of Appellant is characterized as such and is, in ad uncontroverted by any substantial evidence on Respondent's par For example, Respondent neither established another cause for Appellant's injury, nor established the most remote relivancy of Appellant's fall in November, 1974, nor demonstrated that Appellant's corraborated testimony was conclusively unreliab

The only question squarely presented by the case is whether Appellant's injury occurred in the course of employme The law does not require that a victim of internal failure be charged with precise knowledge of his condition; indefinite statements concerning the cause of an injury are not held to defeat recovery. Baker, at 614. From the above statement of law and the Administrative Law Judge's Findings of Fact that it was Appellant's lifting which significantly contributed t the injury, it is clear that her injury was an industrial ac under the statute.

There being substantial evidence to support a finding for Appellant, the Commission acted arbitrarily in assigning more weight to the insubstantial evidence presented by Respondent. That evidence demonstrates only that Respondent was not in compliance with the law which requires employers to carry insurance or to be self-insurers. Utah Code Annotated 35-1-44.

For the reasons stated above, the Order of the Industrial Commission should be reversed and compensation awarded to Appellant.

RESPECTFULLY SUBMITTED,

Gordon J. Low
Attorney for Appellant
175 East First North
Logan, UT 84321

I hereby certify that I mailed, postpaid, copies of the foregoing brief of Appellant to the Industrial Commission of Utah, to George W. Preston, Attorney for Defendant, this _____day of August, 1976.